No. 11276 No. 11274 No. 11275

In the United States
Circuit Court of Appeals
for the Ninth Circuit

GEORGE HENRY CLEVELAND, Appellant, vs UNITED STATES OF AMERICA, Appellee.	)	No. 11276
ALEX L. PENOR, Appellant, vs UNITED STATES OF AMERICA, Appellee.	)	No. 11274
WILLIS BERYL SMITH, Appellant, vs UNITED STATES OF AMERICA, Appellee.	)	No. 11275

COMBINED BRIEF OF APPELLEE

Upon Appeal from the District Court of the United States for the District of Oregon.

HENRY L. HESS,
United States Attorney.
EDWARD B. TWINING,
Assistant United States Attorney.

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Upon Appeal from the District Court of the United States for the District of Oregon.

BRIEF FOR THE UNITED STATES

These are appeals from Judgments of the United States District Court for the District of Oregon, convicting the defendants—appellants of violating Section 11 of the Selective Service and Training Act of 1940, as amended, (50 U.S.C. App. 311).

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Selective Training and Service Act of 1940, as amended (50 U.S.C. App. 301 et seq.), provide:

> SEC. 5 * * *
>
> (d) Regular or duly ordained ministers of religion shall be exempt from training and service (but not from registration) under this Act.
>
> SEC. 10(a) * * *
>
> (2) * * * Such local boards, under rules and regulations prescribed by the President, shall have power within their respective jurisdictions to hear and determine, subject to the right of appeal to the appeal boards herein authorized, all questions or claims with respect to inclusion for, or exemption or deferment from, training and service under this Act of all individuals within the jurisdiction of such local boards. The decisions of such local boards shall be final except where an appeal is authorized in accordance with such rules and regulations as the President may prescribe * * *
>
> SEC. 11. Any person * * * who in any manner shall knowingly fail or neglect to perform any duty required of him under or in execution of this Act, or rules or regulations made pursuant to this Act * * * shall, upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment * * *

The pertinent provisions of the Selective Service Regulations provide:

Sec. 627.2(a) The registrant * * * may appeal to a board of appeal from any classification of a registrant by a local board * * * (1) Within 10 days after the date the local baord mails to the registrant a Notice of Classification (Form 57) * * *

Sec. 653.12 Assignees shall report to the camp to which they are assigned or transferred; remain therein until released or transferred elsewhere by proper authority * * *

QUESTIONS PRESENTED

1. Whether the appellants, who had not appealed from their Local Board's classifications, or had specifically accepted the classifications of the Board, had exhausted their administrative remedies.

2. If appellants were entitled to challenge their classifications in their criminal trials, whether they offered any evidence at the trials which would have warranted findings that their local boards had exceeded their jurisdiction in classifying them.

STATEMENT

A) The appellant in No. 11276, George Henry Cleveland, was indicted on October 17, 1945, charged with deserting Civilian Public Service Camp Number 128, LaPine, Oregon, on June 24, 1945. The entire file of the Selective Service Board was placed in evidence. No appeal was taken from the classification 4E given appellant by the Selective Service Board. Appellant remained in the Civilian Public

Service Camp from January 22, 1944 to June 24, 1945. Appellant testified as to his reasons for believing himself to have been a minister. No exception was taken to the instruction of the Court to the Jury when the case was tried.

B) The appellant in No. 11274, Alex L. Penor, was in the Civilian Public Service Camp from December 20, 1944 to June 11, 1945. He was twenty-one years of age at the time of the trial. The entire file of the Selective Service Board was placed in evidence. Appellant had been classified 1A originally by the Board, and after reporting for induction, had refused to be inducted. He was later offered a 4E classification by the Board, and appellant accepted the offer by telegram. He left the Civilian Public Service Camp and at his trial testified that he considered himself a minister of the Gospel and entitled to a 4D classification. Appellant objected to the instruction of the Court withdrawing from consideration of the Jury the question of appellant's classification by the Board.

C) The appellant in No. 11275, Willis Beryl Smith, was convicted under an indictment charging him with failure to report for induction. The entire file of the Selective Service Board was placed in evidence. Appellant reported for induction under an original classification of 1A, failed to qualify and was later reclassified 4F. Appellant was later given a reclassification of 1A and did not appeal from this classification. Appellant contended at the trial that he had been denied the right of appeal, and that he should

have been classified 4D. Appellant was nineteen years of age at the time of his trial and testified that he had become a minister of the Gospel at age thirteen. Appellant objected to the Court's instruction to the Jury withdrawing from the jurors' consideration the questions of whether or not appellant had been denied his right of appeal, and whether or not he had arbitrarily been denied classification of 4D.

ARGUMENT

I

The appellants did not exhaust their administrative remedies and therefore are not entitled judicially to challenge their classifications.

Cleveland did not appeal from the classification of 4E. (Tr. p. 23). No objection was made by appellant's counsel to the instructions of the Court to the jury. (Tr. p. 25). Under such circumstances, appellant would now have no cause to complain; nor could the Court examine the alleged arbitrariness of the classification by the Local Board, or submit the issue to the jury.

In the Penor case, the appellant, having refused to submit to induction, was offered a 4E classification in lieu of a reference to the United States Attorney. Appellant accepted the 4E classification by telegram. (Tr. p. 31).

In the Smith case, there was no appeal taken from the second classification of 1A. (Tr. p. 16, pp. 22-23).

Where, as in these cases, there has been a failure to complete the administrative remedy, or, as in the Penor case,

a specific acceptance of the Board's classification, it would appear to be conclusive that the trial Court did not err in refusing to submit to the jury any question concerning the Board's classification. We think that the doctrine of *Falbo v. United States,* 320 U. S. 549, applies in such instances.

II

The appellants offered no evidence which would warrant findings that their local boards exceeded their jurisdiction.

Aside from the fact that the appellants had not exhausted their administrative remedies and were not entitled to judicial review of their classifications, it is obvious, we submit, that the appellants offered no evidence at their trials that tended in any manner to impeach the propriety of the Local Boards' classifications.

The appellants' only offer of proof consisted of testimony as to their religious work. (No. 11276, Tr. pp. 19-22). (No. 11274, Tr. pp. 20-41). (No. 11275, Tr. pp. 19-21).

The entire Selective Service file of appellants was admitted in evidence.

A study of the proceedings at the trial discloses that no substantial evidence was offered by defendants in support of the contention that the Local Boards had exceeded their jurisdiction, or had acted arbitrarily. The appellants were permitted to testify as they wished, and there is no showing in these cases that the trial Court at any time refused evidence offered by the appellants in support of such a contention. Consequently, even though it be held that the

appellants could properly demand a judicial review of their classifications, it was not improper for the trial Judge to withdraw consideration of this issue from the jury under circumstances where no adequate proof had been offered of improper conduct by the Boards. We submit that in effect appellants offered no evidence which went beyond a mere quarrel with the decision of the Local Boards.

We think that the language of the Court in *Estep v. United States,* 327 U. S. 114, p. 122, is controlling here:

> "The provision making the decisions of the local boards 'final' means to us that Congress chose not to give administrative action under this Act the customary scope of judicial review which obtains under other statutes. It means that the courts are not to weigh the evidence to determine whether the classification made by the local boards was justified. The decisions of the local boards made in conformity with the regulations are final even though they may be erroneous. The question of jurisdiction of the local board is reached only if there is no basis in fact for the classification which it gave the registrant."

In the Smith case, No. 11275, error is assigned as a result of the trial Court's instruction withdrawing from the jury the question whether or not appellant had been allowed an appeal from the Draft Board's classification. The record discloses that no appeal was ever taken in conformance with the Selective Service Regulations by appellant. (Tr. p. 16; Tr. pp. 22-23). Nor did appellant ever made a protest to the Board. (Tr. p. 16, pp. 22-23).

CONCLUSION

The judgments of conviction should be affirmed.

Respectfully submitted,

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